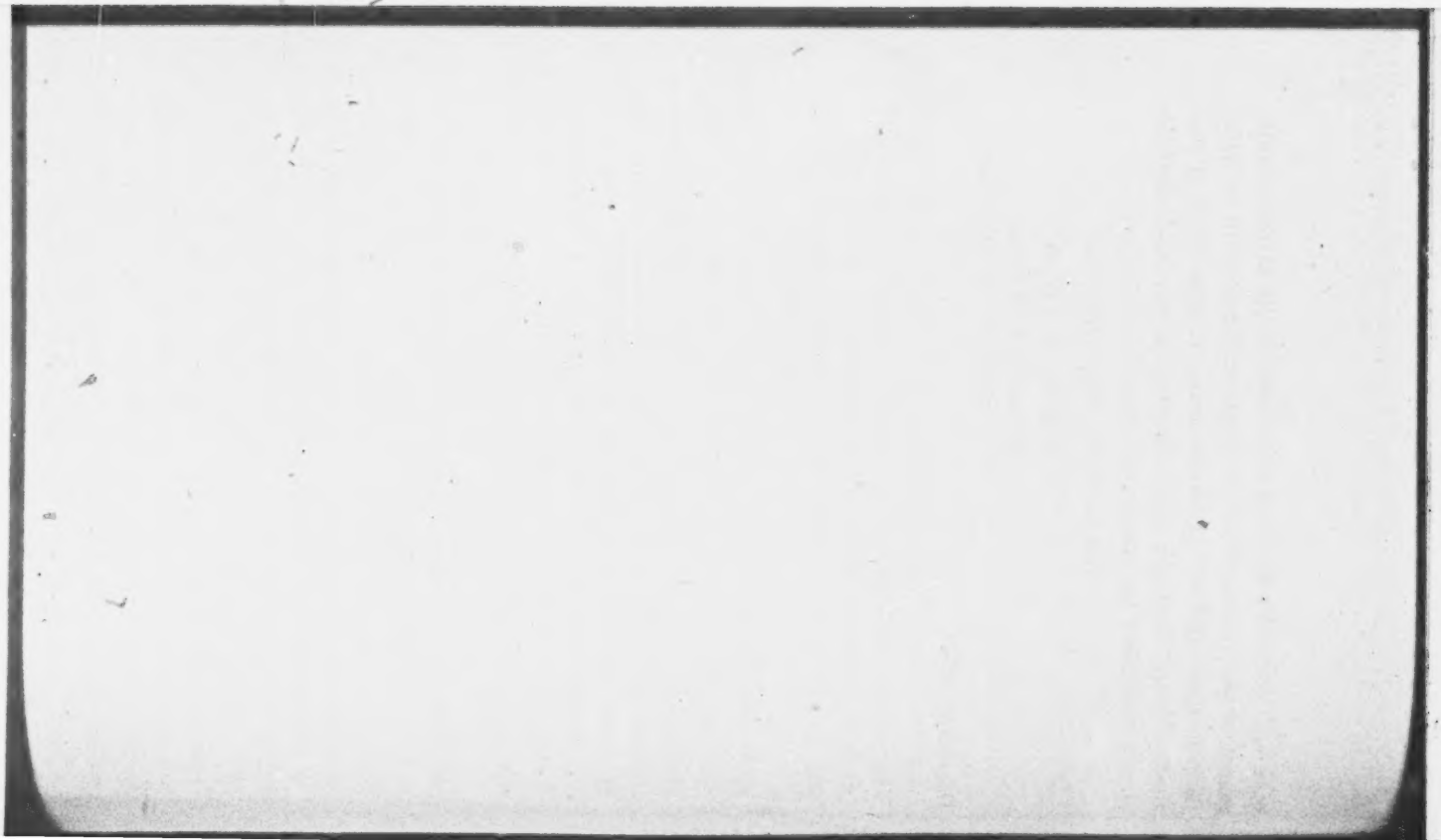

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 495

JOSEPH T. RYERSON AND EDWARD L. RYERSON, JR., AS EXECUTORS OF THE ESTATE OF MARY M. RYERSON,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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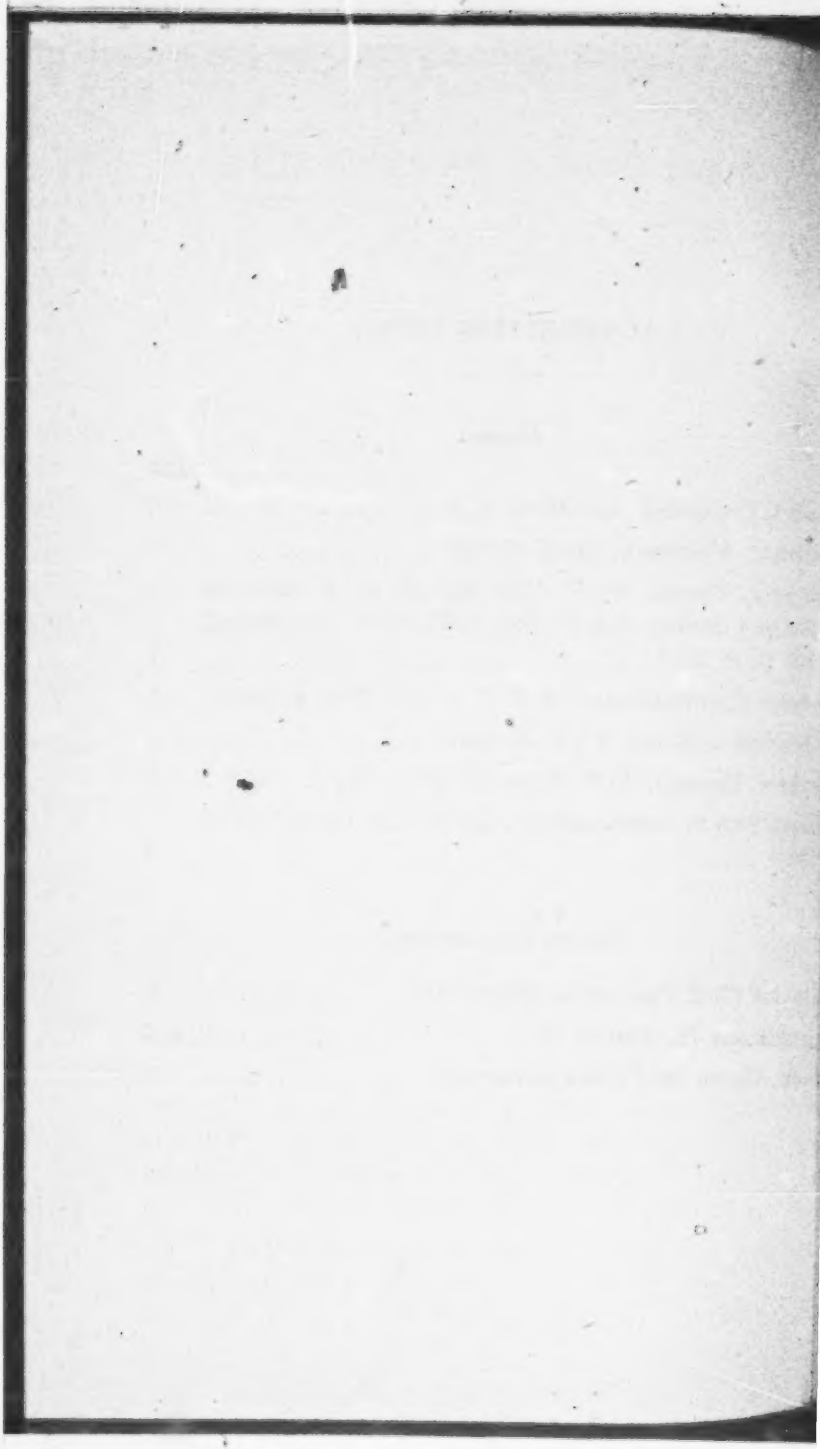
AUTHORITIES CITED.

CASES.

OTHER AUTHORITIES.



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The government's notice of appeal from the judgment of the District Court was limited to so much of the judgment order as awarded judgment in favor of the plaintiff, "which said award is directed pursuant to the conclusion of the Court that where a gift is made in trust the donee of the gift * * * is the beneficiaries rather than the trust" (R. 80). Rule 73(b) of the Rules of Civil Procedure provides that the notice of appeal "shall designate the judgment or part thereof appealed from." The determination that the beneficiaries received present, rather than future, interests was not referred to in the notice of appeal. The government should not now be permitted to raise this question. *Helvering* v. *Wood*, 309 U. S. 344, 348; *Carter* v. *Powell*, 104 F. (2d) 428, 430 (C. C. A. 5th), rehearing denied, 104 F. (2d) 912, certiorari denied, 308 U. S. 611.

But if the question is properly before the court, we believe that nevertheless the government's position cannot be supported.

In the case of the 1933 trust, Mary Ryerson Frost and Donald McKay Frost could at any time jointly demand that the principal be paid over to them.* This joint right extended not only to the proceeds of the insurance policy, but to the policy itself, and its cash surrender value (which was over $40,000). This right was substantially equivalent to ownership of the property. As Mr. Justice Holmes said in *Bullen v. Wisconsin*, 240 U. S. 625, 630, quoting from Lord St. Leonards, "To make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." The interests of these two beneficiaries were scarcely less substantial because they were joint. The District Court's opinion provides a convincing analogy (R. 66, 28 F. Supp. 265, 267; its conclusion was not disturbed by the Circuit Court of Appeals on this point):

> "The government's contention that Donald McKay Frost and Mary Ryerson Frost are not the donees of the gift because neither has individual control over the property but must act jointly with the other is without merit, for under such reasoning a gift of a bank deposit, payable jointly to both of two persons (and not either) would be a gift to no one since neither had complete individual control. Yet it could not be contended that the bank was the donee."

In the case of the 1934 trust, the trust agreement provided (R. 15, 16) that immediately after the death of the insured, the trustees were to divide the trust property into two portions, if Isabelle McGenniss Ryerson was living, paying the income from one portion to her during her life, and transferring the other portion to the descendants of Donald Mitchell Ryerson. If a descendant was under 25 years old, the trustees were to pay him so much of the income of his share as they thought best, and accumulate the bal-

*The right to make such a demand existed while both were living and of sound mind. In the absence of a demand, the trustees were to pay one-fourth of the income to Mrs. Frost during her life, and accumulate the balance. (The trust agreement is quoted at R. 7-14; the provisions referred to are contained in sections 1 and 2, R. 8-9.) Both Donald McKay Frost and Mary Ryerson Frost are, and were at the time of the assignment, living and of sound mind (R. 72).

ance, transferring a portion of the principal to him when he reached 26, and the balance when he reached 30. Donald Mitchell Ryerson had died prior to the assignment, leaving two descendants, Joan and Anthony Ryerson, who were 18 and 16, respectively, when the assignment was made (R. 40). Isabelle Ryerson was 44 years old at the date of the assignment and her interest in the trust property was increased by the assignment by more than $5,000 (R. 40).

The fact that Isabelle Ryerson's interest in the trust fund was a life estate does not make it a future interest. *Blair* v. *Commissioner*, 300 U. S. 5, 13. The Treasury Regulations adopted this position (Article 11, Regulation 79, 1933 Edition, quoted at page 9 of our main brief).

Similarly, the interests of the children under the 1934 trust were not future interests by virtue of the fact that the trustees could accumulate so much of the income as was not used for their support. As the Circuit Court of Appeals for the Eighth Circuit said in *Rheinstrom* v. *Commissioner*, 105 F. (2d) 642, 647-8:

> "It is true that the three children, other than Stewart, received no unconditional right to have their shares of the income paid to them by the trustees. It is equally true, however, that the taxpayer retained no interest in the shares of income which were assigned to them, and that, by the terms of the trust, each of them (or the wives and children of the two sons) were to have his or her share or it was to be accumulated for his or her benefit. The enjoyment of the benefits conferred upon three of her children by the taxpayer was conditional, but it was to commence at once and not at some future date and was for their sole and immediate benefit. * * *
>
> "The Commissioner cites no case which sustains his position that the interests donated by the taxpayer to, or for the benefit of, three of her children, were future interests, and we think that they were not."

The children were the sole persons for whom the fund

inate the difficulty of ascertaining the number of eventual donees, therefore a life estate, presently commencing in possession and enjoyment, with an ascertained beneficiary, was intended to be excluded. We are similarly unable to perceive the "fatuity" of a decision of the Board of Tax Appeals in treating a life estate as a present interest. In the language of both the Committee Reports and the Treasury Regulations, a future interest is one "limited to commence in possession or enjoyment at a future date". This a life estate certainly is not. Article 11 of Regulations 79 (1933 ed.) definitely treated a life estate as a present interest.

Nor do we follow the argument at pages 35 through 38 of the *Pelzer* brief, that because the gift tax supplements the estate tax, and because wills frequently include trusts, no exemption should be permitted for gifts in trust. The exception of future interests from the exemption was, as appears from the Congressional Committee Reports, made not to penalize gifts of such a character, but for administrative convenience. The gift tax act was not primarily intended to discourage gifts—it taxed them. And wills equally commonly contain specific bequests. The argument that if the exclusion were permitted for gifts in trust, the estate tax could be avoided by an unlimited number of such gifts to the donor's "heirs presumptive" overlooks both the limited number of heirs presumptive and the fact that the purpose could equally be accomplished by outright gifts.

Respectfully submitted,

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